CLERK'S OFFICE 7108

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~286~~ 54.

E. M. CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED MARCH 7, 1901.

(18,073.)

(18,073.)

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1901.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of North Carolina, before you, or some of you, being the highest court of law or equity of said State, in which a decision could be had in said suit between State of North Carolina and City of Greensboro and E. M. Caldwell, in which the said E. M. Caldwell was appellant, wherein was drawn in question the validity of a statute, or an authority exercised under, of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, all of which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said E. M. Caldwell, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have
2 the same at Washington, within thirty days from the date of this writ in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of February, in the year of our Lord nineteen hundred and one.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed.
D. M. FURCHES,
Chief Justice of Supreme Court of North Carolina.

3 UNITED STATES OF AMERICA, *ss:*

To the State of North Carolina and City of Greensboro, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on March 4th next, pursuant to a writ of error filed in the clerk's office

of the supreme court of the State of North Carolina, wherein E. M. Caldwell is the plaintiff and The State of North Carolina and The City of Greensboro are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable D. M. Furches, chief justice of the supreme court of North Carolina, this 5th day of February, in the year of our Lord nineteen hundred and one.

D. M. FURCHES,
Chief Justice.

Service of the above citation and receipt of a copy thereof admitted. This Feb'y 5th 1901.

ROBT D. GILMAN,
Attorney General for the State of North Carolina.

Service of the above citation accepted this the 9th day of Feb. 1901.

A. M. SCALES,
Att'y for City of Greensboro.

4 E. M. CALDWELL, Plaintiff in Error,
vs.
THE STATE OF NORTH CAROLINA and THE CITY OF GREENSBORO, Defendants in Error.

Know all men by these presents that we, E. M. Caldwell, as principal, A. W. Witherall and T. H. Main, as sureties, are held and firmly bound unto the defendants, The State of North Carolina and The City of Greensboro, in the full and just sum of five hundred ($500) dollars to be paid to the said defendants, The State of North Carolina and The City of Greensboro, their successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated 24th day of December in the year of our Lord nineteen hundred.

Whereas, lately in the supreme court of the State of North Carolina, in a suit pending in said court between The State of North Carolina and The City of Greensboro, plaintiffs, and E. M. Caldwell, defendant, judgment was rendered against the said E. M. Caldwell, and the said E. M. Caldwell having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of North Carolina and City of Greensboro, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the fourth day of March next: Now, the condition of the above obligation is such that if the said E. M. Caldwell shall prosecute the said

writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

E. M. CALDWELL. [SEAL.]
A. W. WITHERELL. [SEAL.]
T. H. MAIN. [SEAL.]

Sealed and delivered in presence of:

—— ——.

5 STATE OF ILLINOIS, }
County of Cook. }

CHICAGO, *Dec.* 24, 1900.

A. W. Witherell being duly sworn says that he is worth the sum of one thousand dollars, over and above all his just debts and liabilities and in excess of his homestead and personal property exemption.

Subscribed and sworn before me this 24th day of December A. D., 1900.

[L. S.]

W. F. DUNHAM,
Notary Public.

STATE OF ILLINOIS, }
County of Cook. }

T. H. Main being duly sworn says that he is worth the sum of one thousand dollars, over and above all his just debts and liabilities and in excess of his homestead and personal property exemption.

Subscribed and sworn to before me this 24th day of December A. D., 1900.

[L. S.]

W. F. DUNHAM,
Notary Public.

Approved by
D. M. FURCHES,
Chief Justice of the Supreme Court of North Carolina.

(Writ of error, citation and bond filed in the supreme court of North Carolina on February 11, 1901.)

6 *Warrant.*

STATE and CITY OF GREENSBORO *against* E. M. CALDWELL. } No. 1257. Before Z. V. Taylor, Mayor. Warrant for Delivering Pictures.

STATE OF NORTH CAROLINA:

To the chief of police of the city of Greensboro or other lawful officer of Guilford county, Greeting:

Whereas, complaint has been made before me this day on the oath of J. W. Cates that E. M. Caldwell, on or about the 20th day of April, 1900, with force and arms, at and in the county aforesaid

and within the city limits, did wilfully, maliciously and unlawfully engage in the business of delivering pictures without first having obtained a license so to do, against the statute in such cases made and provided, against the peace and dignity of the State, and in violation of the city ordinances. Sec. —, chap. —, page —.

J. W. CATES,
Complainant.

Subscribed and sworn to before me this 21st day of April, 1900.
[SEAL.] Z. V. TAYLOR, *Mayor*

These are therefore to command you forthwith to apprehend the said E. M. Caldwell and him have before me at the mayor's office, then and there to answer the said charge, and be dealt with according to law.

Given under my hand and seal this 21st day of April, 1900.
[SEAL.] Z. V. TAYLOR, *Mayor.*

Special Verdict.

That on the — day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods house, a hotel in the city of Greenboro, and there broke the bulk, placing said pictures in their proper frames and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro;

The defendant had been engaged in this work two days when arrested;

7 That section 57 of the charter of the city of Greensboro, N. C., is as follows: "That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes, and if it be not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely:

"21. Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board of aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a year."

The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section.

That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

"Be it ordained by the board of aldermen of the city of Greensboro, North Carolina:

"That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year.

"Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense."

That neither the defendant, The Chicago Portrait Company, nor any of the employees of the Chicago Portrait Company have paid the city any license tax.

If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty.

8 STATE and CITY OF GREENSBORO *against* E. M. CALDWELL.

Upon the foregoing special verdict it is adjudged that defendant is guilty, and that he pay a fine of $20.00 and costs of this action.

Motion for new trial for errors occurring during trial. Motion denied; defendant excepts; judgment; defendant again excepts and appeals to supreme court. Notice of appeal waived. Undertaking on appeal fixed at $35.00. By consent defendant allowed thirty days to serve case on appeal; solicitor allowed thirty days thereafter to serve counter-case.

STATE OF NORTH CAROLINA, *Guilford County.*

In the Superior Court, June Term, 1900.

STATE and CITY OF GREENSBORO *against* E. M. CALDWELL. — Statement of Defendant's Case on Appeal.

This was an action tried before Moore, judge, and a jury at the June term, 1900, of Guilford superior court.

Proceedings were commenced against the defendant by the issuing of a warrant by the mayor of Greensboro on the 21st day of

April, 1900, on the complaint of J. W. Cates. Said warrant was returnable before said mayor of Greensboro at his office on said 21st day of April, 1900. Upon the hearing before the said mayor of Greensboro defendant was adjudged guilty of engaging in the business of delivering pictures without first having obtained a license so to do and it was adjudged that he pay a fine of ten dollars and costs.

From this judgment the defendant appealed to the superior court.

Upon the trial in the superior court the jury found a special verdict. Upon the facts set out in said special verdict the court instructed the jury that they should find the defendant guilty. Defendant excepted. Verdict of jury was guilty. The judgment in the mayor's court was affirmed and the judgment of the superior court was that defendant pay a fine of ten dollars and costs. There was a motion for a new trial, which motion was overruled and defendant excepted. From the judgment rendered an appeal was taken to the supreme court.

The defendant assigned as grounds of error :

I. The facts set out in the special verdict do not make defendant guilty of engaging in the business of delivering pictures without first having obtained a license so to do—within the purview and contemplation of the ordinance of the city of Greensboro.

II. That should defendant be held liable under the ordinance in controversy, said ordinance is unconstitutional, being in conflict with article I, section 8, of the Constitution of the United States, being an interference with, and an attempt to regulate commerce among the States and a burden upon the same.

9 The warrant, special verdict, docket entries and clerk's certificate of deposit in lieu of appeal bond for costs, with defendant's statement of case on appeal will constitute case on appeal.

CHARLES M. STEDMAN,
Attorney for Defendant.

Statement of defendant's case on appeal admitted to be correct and adopted as case on appeal this — of September, 1900.

A. L. BROOKS, *Solicitor.*

Bond.

NORTH CAROLINA, }
Guilford County. }

I, Jno. J. Nelson, clerk of the superior court in and for said county, do hereby certify that E. M. Caldwell has deposited with me the sum of thirty-five dollars in lieu of appeal bond to supreme court. Witness my hand and seal this —— —, 1900.

—— ——.

NORTH CAROLINA, }
Guilford County. }

I, John J. Nelson, clerk of the superior court of said county, do hereby certify that the foregoing is a true and perfect copy of the

record and case on appeal in case State *vs.* E. M. Caldwell. In witness whereof I have hereto set my hand and official seal at office in Greensboro, N. C., this —— —, 1900.

JNO. J. NELSON, *C. S. C.* [SEAL.]

Service of defendant's statement on appeal made and accepted in due time.

SCALES & SCALES.

(Docket entries.—Appeal docketed Oct. 22, 1900. Argued Oct. 27, 1900, by attorney general and Scales & Scales for plaintiff and C. M. Stedman for defendant. Opinion handed down November 7, 1900.)

10 N. C. Supreme Court, Sept. Term, 1900, Guilford County.

STATE & THE CITY OF GREENSBORO
v.
E. M. CALDWELL, Appellant. } # 172.

Chas. M. Stedman for appellant; attorney general and Scales & Scales for appellee.

FURCHES, *J.*:

This is a prosecution for an alleged violation of an ordinance of the city of Greensboro. There was no objection or exception to the manner in which it was commenced, and it may be maintained if the defendant has violated the city ordinance, State *v.* Higgs, 126 N. C. 1014, unless the ordinance is in contravention of the doctrine of interstate commerce, and therefore is unconstitutional.

The case comes to this court on appeal of defendant from the judgment of the court below upon the following special verdict:

"That on the — day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods house, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro;

The defendant had been engaged in this work two days when arrested;

That section 57 of the charter of the city of Greensboro, N. C., is as follows: 'That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes,

and if it be not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely:

'21. Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board
11 of aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a year.'

The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section.

That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

'Be it ordained by the board of aldermen of the city of Greensboro, North Carolina:

'That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid, shall pay a license tax of ten dollars for each year.

'Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense.'

That neither the defendant, The Chicago Portrait Company, nor any of the employés of the Chicago Portrait Company, have paid the city any license tax.

If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty."

12 Upon this special verdict the court held that the defendant was guilty, the verdict was so entered, and the defendant fined $20. From this verdict and judgment the defendant excepted and appealed to the supreme court. The defendant assigns as ground of error:

1. The facts set out in the special verdict do not make the defendant guilty of engaging in the business of delivering pictures without first having obtained a license so to do—within the purview and contemplation of the ordinance of the city of Greensboro.

2. That should defendant be held liable under the ordinance in controversy, said ordinance is unconstitutional, being in conflict with article I section 8 of the Constitution of the United States, being an interference with, and an attempt to regulate commerce among the States, and a burden upon the same.

We will consider these assignments in the order in which they

are stated, for if the defendant has not been guilty of carrying on a business in violation of the city ordinance, then he is guilty of no offence—is not guilty—and there is nothing for the second assignment to rest upon.

It seems to us that a good way to test this exception is to divest our minds of the fact that the defendant was the agent of the Chicago Portrait Company, and to consider him as a citizen of Greensboro, who had bought these pictures and had them shipped to him in the unfinished state they were. And he had taken them to his house, opened them, assorted and put them together, and then sold and delivered them to parties in town; would he not have been a dealer engaged in selling and delivering pictures and picture frames in violation of the ordinance? We think he would, and would be guilty, would be unless he is protected by the reason of the unconstitutionality of the ordinance, as stated in the second assignment of error. And it being claimed in this assignment that it involves a constitutional question, that it is in violation of "article I section 8 of the Constitution of the United States, being an interference with, and an attempt to regulate commerce among the
13 States and a burden upon the same," it becomes an important question and should be well considered. This has been well done by arguments of the learned counsel and the well-considered brief of defendant.

It is contended in this brief that no State has a right to levy a tax on interstate commerce, and for this Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 and Crutcher *v.* Kentucky, 141 U. S. 47 are cited. This position is true. And the defendant then contends that this ordinance is unconstitutional because it levies a tax on interstate commerce. For this position he cites quite a number of cases which he says sustain it. Among them, we will only mention those apparently most relied on. Robbins *v.* Shelby Taxing District, 120 U. S. 480; Brennan *v.* Titusville, 153 U. S. 289; Adkins *v.* Richmond 47 L. R. A. 583. The proposition of law contended for is undisputedly true, that a State cannot tax interstate commerce. The trouble is not in not being able to understand this rule of law, but in applying it.

The defendant insists that Brennan *v.* Titusville, *supra* is directly in point—is in every essential fact this case—and should control the opinion of the court in this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case, the goods were shipped directly to the purchaser. In this case, they were shipped by the Chicago Company to itself in the city of Greensboro; and when they reached Greensboro, the defendant as the agent of the Chicago Company received them from the railroad at its depot, carried them to their rooms in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted and put them together and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this

case would have fallen within the decision of Brennan *v.* Titusville, *supra*, and we should hold, as it was held there, that it was
14 an interference with interstate commerce and that the defendant was not guilty.

But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract; and no title passed by this contract. Tiedman on Sales, sects. 88, 89; Empire Drill Co. *v.* Allison, 94 N. C. 548. If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago—the railroad being deemed to be the agent of the consignee, State *v.* Groves, 121 N. C. 632, Railroad *v.* Barns, 104 N. C. 25, and Brennan *v.* Titusville, *supra*, would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to themselves—"The Chicago Portrait Company"—in Greensboro. This being so, no title ever passed from the Chicago Portrait Company, until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago Company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable for a city tax, for which its own citizens would be liable? It seems to us that it could not. This case seems to fall under the doctrine of Emmett *v.* Missouri, 156 U. S. 296 and Range Co. *v.* Carver, 118 N. C. 328. There was no sale—no title passed from the Chicago Portrait Company until the pictures were completed and delivered to the purchasers.

We are therefore of the opinion that the defendant was engaged in the business of selling and delivering pictures and picture frames in the city of Greensboro; and, as we are not able to see how the enforcement of this ordinance interferes with interstate commerce, the judgment of the court below is affirmed.

15 CLARK, *J.*, dissenting:

The orders for the portraits and frames were taken in Greensboro by the travelling agent of a Chicago firm. If the portraits made in Chicago in consequence of such contract had each been sent direct to the person for whom it was made this would have been interstate commerce. This feature of the transaction is not changed by the fact that a batch of portraits was sent "knocked down" to Greensboro, the frames and portraits packed separately, and were by another agent of the shipper who came to Greensboro for that purpose from Chicago put together, each portrait in its frame. This was simply an economical method of transportation. There is no new contract with the customer. There was no "breaking of bulk" in the legal meaning of the term, for each article though shipped with others kept its individuality. Each portrait could be of use only to the person for whom it had been made and was as distinctly

severed from the rest by that fact as if it had been sent in a separate cover. The only contract was that between the Chicago firm's agent in the first instance and the customer. The title does not pass until the picture is approved and paid for. This is the same case as Robbins *v.* Shelby Taxing District, 120 U. S. 480, in which it was held that the business of offering for sale, or selling, goods to be shipped to the buyer from another State is interstate commerce. This is not the case of State *v.* French, 109 N. C. 722 or State *v.* Wessell, *id.*, 735, in which the goods were bought in another State, shipped here in bulk, and then by the buyer were sold to his customers. The sale by such buyer to his customers was a North Carolina business and taxable. But here the only "dealing" is between the Chicago house through its agent with a customer here and the shipping of the identical article to an agent in Greensboro whose sole duty is to complete the delivery upon payment of the purchase-money.

At the end of the dissenting opinion, is the following:

"FAIRCLOTH, *C. J.*:

I concur in the above."

16 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Guilford county; upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of the said superior court. It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable D. M. Furches, justice, be certified to the said superior court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred, to wit, the sum of twenty $\frac{70}{100}$ dollars ($20.70) and let execution issue therefor.

NORTH CAROLINA, }
Supreme Court. }

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true and correct transcript of the record on file in this court in an action entitled "State and City of Greensboro against E. M. Caldwell."

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 19th day of February, 1901.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of Supreme Court of North Carolina.

Endorsed on cover: File No. 18073. North Carolina Supreme Court. Term No. 266. E. M. Caldwell, plaintiff in error, *vs.* The State of North Carolina and The City of Greensboro. Filed March 7th, 1901.